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Environmental Permit Process and Swedish Mining

An analysis and evaluation of permit review for environmentally hazardous activitites[1]

Abstract

In order to carry out mining and mineral operations in Sweden, a number of permits are required. The two most important permit processes are those relating to mineral rights and environmental permits. Questions relating to the efficiency of the permit processes have been discussed in a number of studies and reports in recent years. Given that Sweden has some of Europe's most promising geological conditions for the green transition, the need for a more efficient permit process is an important matter.

The overall purpose of this study is to examine more closely the design of the environmental legal assessment that takes place before the processing and extraction of minerals in mining operations in the Swedish system. For this, a traditional jurisprudential approach has been applied, which includes analyses of legislation, preparatory works, legal practice and doctrine. A number of judgments and decisions have been used as supplementary case studies. Overview comparisons with corresponding assessment processes in the Nordic countries have been carried out.

The results indicate that the current environmental permit process in court, can be questioned on efficiency and other grounds. An administrative authority in first instance would bring several advantages Furthermore, the findings raise questions regarding the extensive investigations and the wide-ranging consultations required. As a conclusion, the study perceives that there are good reasons for a re-examination of the environmental permit process as a whole, rather than minor adjustments to the individual elements of the existing review design.

1. Introduction

In order to carry out mining and mineral operations in Sweden, a number of permits are required. The two most important permit assessment processes are those relating to mineral rights and environmental permit. The mineral legal review is regulated in the Minerals Act and the environmental legal review is regulated in the Environmental Code.

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[1] The article is mainly based on a recently reported research project (Ekbäck, Persson and Liedholm Johnson, 2024).

Questions relating to the efficiency of the permit processes have been discussed in a number of studies and reports in recent years.[2]. Given that Sweden has some of Europe's most promising geological conditions for the green transition, the need for a more efficient permit process is an important matter (cf. SOU 2022:56).

The overall purpose of this study is to examine more closely the design of the environmental legal examination that takes place before the processing and extraction of minerals in mining operations in the Swedish system. The general objective has further been broken down into five specific research questions:

- What were the underlying motives for designing the Swedish environmental permit process with the court as the first instance?
- How are the roles assigned to different authorities managed, and how are the conflicts that may arise between opposing public interests resolved?
- What have been the most important consequences of the above two approaches in practice, and how can these consequences be related to the original and underlying legislative objectives?
- How efficient is the Swedish environmental review process, from a societal perspective?

In order to answer the research questions, a jurisprudential approach has been employed, i.e. we have analyzed constitutional text, preparatory work, case law and doctrine, reports and other relevant material. The judgments and decisions (case studies) that are analyzed have been decided during the period 2021–2023 and show examples of such conflicts that may be relevant in environmental permit review or changes to environmental permits.

The article is structured as follows: In section 2, a brief description of the historical development concerning the environmental legal framework and the underlying motives for the design of the review process is given. Section 3 provides an overview of the legal rules that the actors in the mining industry must comply with. Furthermore, a number of current judgments and decisions concerning environmental assessment for various mining projects are commented on, with the aim of indicating how the regulations have been applied in practice. A schematic comparison with the basic structures of the environmental assessment system in the other Nordic countries is presented in section 4. The article concludes in section 5, with discussion, analysis and conclusions.

2. Environmental process in Swedish law – historical overview and current system

2.1 Previous review system

Until 1969, there were to a large extent no rules on environmental protection in Swedish legislation. Some provisions were contained in the older Water Act on the discharge of waste water, which was reviewed by the Water Courts of that time.

[2] See e.g. Tillväxtanalys (2016a), Bäckström (2015), Söderholm et al. (2022), Tillväxtanalys (2016b), SOU 2022:33.

However, through the 1969 Environmental Protection Act, regulations were brought together for the first time to protect the external environment against pollution and other disturbances. The Environmental Protection Act regulated so-called environmentally hazardous activities, i.e. water pollution, air pollution, noise and other immissions arising from the use of land, a building or a facility. The air pollution regulations were completely new, the water pollution regulations were carried over from the Water Act and tightened.

During the work on the Environmental Protection Act, the commission of inquiry discussed different options for which authority that should examine the permit issue (SOU 1966:65 pp. 202-205). Among other things, thoughts were put forward about transferring the assessment to the newly formed administrative authority, the Swedish Environmental Protection Agency. However, this option was considered to upset the entire system for water pollution cases at the time, and the close connection to the existing water pollution cases (according to the Water Act at that time) constituted a supporting argument for placing the assessment in the Water Court organization.

The commission's proposal to turn the Water Courts into concession authorities was, however, criticized by several referral bodies, who questioned the appropriateness of placing the concession assessment in a court, and instead emphasized the principle of an administrative review of the admissibility issues. The common point in the objections was that the nature of:

> "… the balancing issues that the concession-reviewing authority is faced with generally seem to be of such a nature that their assessment must in the long run affect the entire development of society and that it can be questioned whether considerations of this kind at all belong to the court." (Proposition 1969:28 pp. 80-81)

On the basis of these advisory opinions, the Government appointed a new commission of inquiry, which put forward the view that the balancing that must be undertaken in permit review of environmentally hazardous activities was obviously not of a judicial nature. The granting of permission must instead be based on general assessments of an economic and technical nature, and should therefore be left to an administrative authority. Furthermore, the investigation pointed out that permit issues of this kind are almost invariably handled administratively in other countries where environmental cases are examined. The Government agreed with the inquiry's view:

> "What typically distinguishes administrative issues is that the decisions are based on considerations of suitability, e.g. of an economic, technical and social nature. A permit to carry out a facility or an operation that may cause water pollution or other disturbance to the environment must be preceded by a consideration of this nature. Such a permit can have effects in many areas of society. It can thus concern health care, nature conservation, employment and social conditions, economic development, community building, etc." (Proposition 1969:28 p. 195)

The stated objective was to find an organizational and procedural design that made the permit assessment a part of an efficient and socially beneficial environmental protection policy, that decisions could be reached quickly and smoothly and with

expert consideration of the diversity of societal interests that were affected, and that the application became uniform and consistent. At the same time, reasonable demands for legal security must be met.

> ”With the tasks at issue here, an administrative procedure better satisfies the wishes for efficiency, speed and flexibility than the court procedure. Discussions with the applicant and other parties can take place in free forms. Consultations with other authorities can be arranged in a simple and flexible way. More trivial matters can be dealt with without the unnecessary delay that sometimes accompanies the more formal court proceedings.” (Proposition 1969:28 p. 196)

In summary, the Government considered that overwhelming reasons unequivocally spoke for an administrative permit review of the issues. The final solution was the establishment of a new authority – the Concession Board for Environmental Protection – with an administrative review in a court-like board.

The choice between administrative authority and court also came to be a significant issue when working on the new Water Act from 1983, because the examination of water activites required a comprehensive assessment with regard to various general planning points of view. That the final choice fell on the existing organization with Water Courts was justified, among other things, with the fact that they represented a well-established system, the connection between permit issues and provisions with compensation issues, as well as the risk of efficiency losses if two different authorities had to deal with the complicated issues (Proposition 1982/83:130).

2.2 Current review system

During the 1980s, the extensive investigative work began to coordinate and tighten the rather fragmented regulations on environmental protection in a coherent Environmental Code, with the aim of greater consideration of the environment for all activities and measures. The Environmental Code reform aimed to create a coordinated, tightened and broadened environmental legislation for sustainable development. It was not only intended to replace the previous protection regulations in the area of environmental and health protection, but also included legislation concerning physical planning and nature conservation.

In order to be able to more clearly consider which review system should be chosen, the commission of inquiry began its investigation by stating which requirements should be placed on a permit review system in the Environmental Code (SOU 1996:103 pp. 469-480):

1) an environmental approach should pervade the entire Environmental Code, including the review system,
2) the examination system should be adapted to the substantive rules of the Code,
3) integration and fusion should take place as far as possible,
4) the European Convention's requirements for court access must be met,
5) judicial review of Government decisions should be avoided,

6) the review system should be legally secure with a high level of competence on the part of the decision-makers,
7) the instance order should be made as simple as possible,
8) the review system should be as cheap, efficient and rational as possible,
9) the Government should be relieved of administrative matters.

A number of conceivable alternatives of review systems were then outlined, partly with the Concessions Board remaining in various central functions, partly with Environmental Courts. The commission of inquiry assumed that the water cases – with the damage and compensation regulations they included – must continue to be handled by some form of court. This premise would then have the effect that the alternatives with a central administrative review authority (the Concession Board) would lead to a division of the assessments in that the environmental protection cases would be reviewed by the central authority while the water cases would remain in the Water Courts. The commission of inquiry therefore recommended that new Environmental Courts be established for permit assessment of both environmentally hazardous activities and water activities.

The referral outcome was mixed, some referral bodies supported the proposal with Environmental Courts, while others rejected the proposal in whole or in part, e.g. based on the principal position that an administrative issue should first have been assessed by an administrative authority before the court review takes place.

In the Government's Bill, the design of the review system was consistent with the commision's proposal, even if the Government at the same time opened up for future changes:

> "The Government notes that the commission of inquiry did not make any proposal regarding the appropriateness of permit review to take place in administrative order in the first instance. Against the background of the path taken with the purification of the courts' duties and the views of the Legislative Council and the referral bodies, there is however reason to consider whether in the future, permit review should lie directly with the Environmental Court or whether the matter should be heard by the court only after an appeal against an administrative authority's decision. The Government intends to start a review of the issue of permit assessment in the first instance as soon as possible. Time does not allow for the review to be carried out before the Environmental Courts are established because it is urgent to have a joint handling and examination of environmental issues already from the time the Environmental Code comes into force. Therefore, in accordance with the inquiry's proposal, Regional Environmental Courts attached to certain district courts should be established." (Proposition 1997/98:45 p. 461)

Through the Environmental Code, a completely new joint review process was introduced for environmentally hazardous activities and water activities. Environmental Courts were established and came to replace the previous bodies, the Concession Board for Environmental Protection and the Water Courts, respectively. As the first instance, the Environmental Courts would deal with and review cases concerning more extensive environmentally hazardous activities, water cases and compensation cases of various kinds. After a succeeding reform of

the organization of the courts in 2010, today the examination takes place at the Land and Environmental Court.

2.3 Subsquent proposals for reforms

The lack of clarity and ambivalence that marked the choice of review authority and procedure for environmental permit reviews continued in the period around and after the launching of the Environmental Code.

Among other things, one commission of inquiry investigated the future duties of the court system. The presented conclusions in the report regarding streamlining the role and tasks of the courts meant that the courts should in principle only have judicial tasks, and thus not decide typical administrative issues (SOU 1991:106). The principle of streamlining the role and duties of the courts has been laid down in subsequent Government Bills on several occasions.

The Government promise in the Environmental Code Bill, to investigate potential review of environmental permits in administrative form, took place in several rounds in the years after the introduction of the Environmental Code.[3] A common proposal in all these investigations was to distinguish permit issues from compensation issues, and that permits in the first instance would be assessed by an administrative authority, while compensation issues would instead be adjudicated by a court. None of these proposals have yet been implemented.

3. Current substantive and procedural provisions for mining

The overall legal review process from prospecting for new mineral deposits to actual mining can be described as a multi-stage examination, namely what is required in order to:

1) undertake exploration or prospecting measures,
2) obtain a concession for extraction works,
3) obtain an environmental permit,
4) obtain a land acquisition order as well as
5) if necessary, obtain building permits.

The regulations are found in several different enactments that are applied in parallel, which is why the review process for mineral extraction in particular differs from other environmentally hazardous activities. The main regulations are found in the Minerals Act, the Environmental Code and the Planning and Building Act.

3.1 Minerals Act

In order to carry out exploration or prospecting measures, an *exploration permit* is required, according to Chapter 2 in the Minerals Act. The application is handled by

[3] See e.g. SOU 2004:38, SOU 2005:59 and SOU 2009:10.

the Mining Inspectorate, and permission is only given under certain specified criteria.

If the exploration measures lead to finding deposits that are worth mining, an *extraction concession* is needed, according to Chapter 4 in the Minerals Act. These matters are also handled by the Mining Inspectorate, with certain exceptions. A concession must be granted if a deposit that can be exploited economically has been found, and the location and nature of the deposit do not make it inappropriate for the applicant to receive the requested concession. However, a concession does not mean exemptions from other rules, primarily the Environmental Code, the Planning and Building Act and the Historic Environment Act. The purpose of the regulations is to resolve conflicts between different interests, primarily exploitation interests and conservation interests.

Chapter 5 in the Minerals Act states that the concession holder may only claim land designated for the purpose. At a so-called land assignment procedure, the land within the concession area that the concession holder may claim for processing the mineral deposit is determined. A *land designation decision* partly aims to give the concession holder access to the land in question, partly to regulate how the land may be used, and partly to compensate the landowner for the encroachment.

3.2 Enviromental Code

For mining operations, a permit is also required according to Chapter 9 of the Environmental Code, because mining constitutes an environmentally hazardous activity. As previously mentioned, the application for an environmental permit is examined by the Land and Environmental Court. The objective of the environmental review is to determine which conditions must be met in order for an activity to be conducted. The environmental assessment of mining activities is thus based on an assessment of the mining activity's effects in relation to human health and the environment.

Several central criteria must be met during the review, such as the precautionary principle, the knowledge requirement, the location rule, as well as the general considerations and sustainability regulations.

An environmental impact assessment must be attached to the application for a permit, where the direct and indirect environmental consequences of the operation in the broadest sense must be described. The information that must be included in the environmental impact assessment must have the scope and degree of detail that is reasonable with regard to current knowledge and assessment methods, and that is needed for an overall assessment to be made of the significant environmental effects that the activity or measure can be assumed to entail.

3.3 Planning and Building Act

Since mining operations mean that buildings and facilities need to be constructed, the provisions on building permits in the Planning and Building Act are also applied. Building permits are reviewed by the municipality.

3.4 Judgments and decisions on mining operations

In order to examine how the above regulations are applied in practice, a number of case studies of recently announced judgments and decisions concerning mining operations have been studied:

- Dannemora Iron (M 4653-22)
- Talga (M1573-20)
- Liikavaara at Aitik mine (M 2672-18)
- Kaunisvaara, Kaunis Iron (M 2090-19)
- Boliden Mineral (M 992-21)

Looking at the regulatory framework, it can be concluded that environmental legislation is characterized by legal obligations based on directives and regulations from the EU. That legislation must be linked with other, more national legislation, which can obviously lead to conflicts between the legislation's function, purpose and focus.

Within the applicable regulations, it can also be noted that the legislation has purposes that can be difficult to harmonize. The Mineral Act aims, e.g. to achieve efficient and effective exploration and extraction so that society's needs for various minerals can be met. The purpose of the Environmental Code, on the other hand, is to promote sustainable development by primarily protecting the environment and human health against damage and inconvenience. These two completely different purposes can be difficult to combine.

As regards the case studies, it can firstly be stated that the decision documents are considerable, or even very extensive. In some cases, the judgments amount to several hundred pages.

A second reflection regarding the case studies concerns the so-called consultation procedure, which is a very important part of the permit review. The consultations provide authorities, organizations and individuals who can be assumed to be affected by the activity or measure with information about the planned activity, and they can there submit objections to the company's application for an environmental permit. How the consultation is to be carried out must be adapted to the circumstances of each individual case. However, the group of consultation parties is, as a rule, very broad, and includes various authorities, organisations, individuals and the general public.

A third reflection regarding the case studies concerns the number of conditions that accompany a granted permit. The conditions can be extensive both in number and in their design. It is not possible to estimate in advance how many conditions the granted permit will be connected to.[4]

[4] For a detailed presentation of the case studies in question, see Ekbäck, Persson and Liedholm Johnson (2024 pp. 43-52).

4. Nordic outlook

As a basis, a comparative analysis has also been carried out of the principal design and structure of the environmental assessment systems in the neighboring Nordic countries. The choice of the Nordic countries is primarily based on the proximity to Sweden in terms of legal, constitutional, political and other socio-cultural points of reference.

The comparative analysis shows that environmental legislation in the Nordic countries has many common denominators, much depending on the impact of EU law on the environment, such as e.g. The EIA Directive.

It can also be noted that our neighboring countries have chosen to leave the environmental review to administrative authorities. The Swedish system is different in that regard, because the environmental review as a main principle takes place at the Land and Environmental Court. In Denmark, Norway and Iceland, it is not courts that constitute appeal bodies either, but other administrative authorities have that role.

At system level, a comparative analysis of the Nordic countries' environmental review systems can be summarized in table 1, below.[5]

Table 1: Summary overview of the Nordic review and appeal systems for environmental permit assessment

	Denmark	Finland	Norway	Iceland
First instance	***Administrative:*** Kommun / Amtsråd / Miljøstyrelsen	***Administrative:*** Kommun / Miljötillståndsmyndighet	***Administrative:*** Kommun / Fylkeskommun / Miljødirektoratet / Klima- og miljødepartementet	***Administrative:*** Hälsokommittéer / Miljömyndigheten
Second instance	***Administrative:*** Miljøstyrelsen / Miljø- og Fødevareklagenævnet	***Administrative Court:*** Förvaltningsrätt	***Administrative:*** Fylkeskommun / Miljødirektoratet / Klima- og miljødepartementet	***Administrative:*** Kommittén för klagomål på miljö och naturresurser
Third instance	***Administrative:*** Miljø- og Fødevareklagenævnet	***Administrative Court:*** Högsta förvaltningsdomstolen	***Administrative:*** Miljødirektoratet / Klima- og miljødepartementet	?

5. Concluding discussion and analysis

On an overall level, the design of society's institutions should strive towards two guiding objectives: Efficiency and justice. The goal of efficiency is about using society's resources in a way that avoids waste of resources, while the goal of justice can be somewhat simplified linked to issues of legitimacy.

When it comes to assessment of land uses, the efficiency goal can further be broken down into the desire for material and procedural efficiency, respectively. Material efficiency means that the regulatory framework should create conditions for long-term appropriate and profitable allocations of society's land and water resources.

[5] For a more detailed description, see Ekbäck, Persson and Liedholm Johnson (2024 pp. 57-63).

Procedural efficiency means that society's costs for decision-making processes concerning change or protection of land uses – so-called transaction costs – should be as low as possible.

5.1 The permit review system

When it comes to different types of review procedures, a distinction is usually made between issues of:

- Admissibility, permission, dispensation, etc.
- Acquisition of land and property rights
- Compensation for encroachments and damages

Previous research has shown that there are clear and well-motivated connections between different types of reviews/decisions and different procedural designs.[6] Questions about admissibility and permits are usually reviewed and decided in administrative forms. Questions about land access and compensation are usually tried jointly and determinated in court proceedings or cadastral procedures. See examples of the Swedish review systems for other types of land use projects in Figure 1, below.

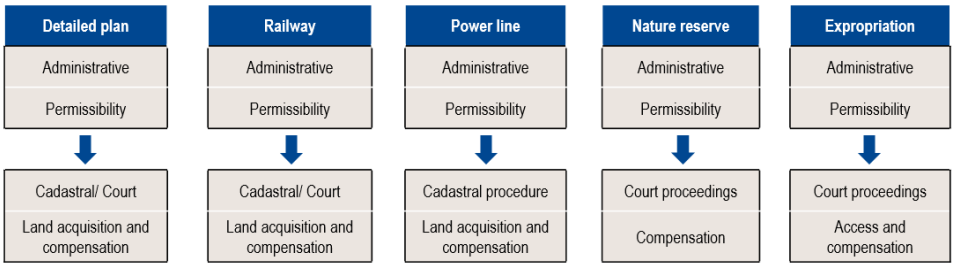

Figure 1: Design of permit, acquisition and compensation processes for different types of land use projects in Swedish legislation.

The connection between different types of reviews/decisions and procedures can be linked to the different characteristics of the assessments in terms of externalities, the number of affected social sectors and individuals, as well as the degree of concentration and spread of the impact of the ruling.

With these points of departure, there are both principal and logical reasons for transferring the review of environmental permits according to the Environmental Code to an administrative procedure with an administrative authority.

The idea of an administrative review of environmental permits is also supported in the Nordic outlook presented in section 4. As stated there, permit issues are reviewed by administrative authorities in all other Nordic countries, with Sweden

[6] See e.g. Ekbäck (2000), Ekbäck (2013), Ekbäck and Christensen (2020).

as the outstanding exception. In addition, appeals do not take place in judicial order in several of our neighboring countries, but to a superior administrative authority.

5.2 Regulations and application in practice

For a legally secure application of the regulations, it is important that the case law is uniform and predictable. Regarding mineral and environmental permits, however, the prerequisites for carrying out the activity are specific to each individual case. The assessment of the mining activity is thus decided on a case-by-case basis in a fairly detailed manner. It is therefore difficult to predict whether an application will result in a granted permit, as in a comparable permit case.

Furthermore, it is difficult to predict how the relatively general legal rules will be applied in an individual permit review case. It can be stated from the case studies that the number of conditions and the level of detail of the conditions differ, as does the number of parties that are part of the consultations. In all permit reviews, it is a matter of balancing opposing interests where different values can outweigh in relation to others. In addition to the balancing of interests, there are also questions of evidence. Is the applicant able to demonstrate that the protective measures to be taken entail long-term protection for valuable interests and values?

The question of whether the case law is uniform and predictable cannot therefore, in our opinion, be answered with a clear no or a clear yes. This is partly due to the fact that the legal rules themselves are both imprecise and complex, and partly due to the specific conditions for each individual case. These two factors mean that the trial will be fairly casuistic, i.e. the assessment of whether an environmental permit should be granted is decided on a case-by-case basis in a fairly detailed manner.

Something noted in the legal cases studied is the number and scope of the investigations that must precede the judgement on the environmental permit, as well as the far-reaching requirements for consultation that includes a very broad group of actors, authorities, organizations and individuals. From a general law and economics perspective, the various investigative and other steps taken during a decision-making process entail procedural costs for society. These procedural costs must be balanced against the positive effects that the improved decision-making basis generates. When more resources are invested in the basis, it is a reasonable assumption that the material effects of the final decision are improved.

Deviations from the material objectives can arise for several reasons: Shortcomings and incompleteness can adhere to the foundations of the ruling, irrelevant considerations can be taken into account, the law's substantive or procedural decision rules are waived by the authority, etc. Material costs of these kinds are clearly connected to the concept of substantive legal security, but can also be perceived as a measure of the legal quality of the decisions made.

At a certain level, however, the last incurred procedural costs will not generate a corresponding positive effect on the material side: At the margin, the opportunity costs of the material allocation are lower than the procedural costs. To summarize with this digression on procedural and material costs; a benchmark for the design of the review process should be that the sum of these two costs is minimized.

5.3 Concluding remarks

As stated above, justified criticism can be directed at the current design of the environmental permit process in several different respects. this involves, among other things, the instance order and the basic organizational structure of the review system, but also the extent and limitation of the investigative demands, the design of the consultation procedure, and the need for a more uniform and predictable legal practice.

In summary, it is thus our final recommendation that the environmental permit process should be re-examined and evaluated in its entirety, rather than minor adjustments to the details of the existing procedural design. A holistic approach is desirable, where all the above elements are included as unconditional elements.

Administrative review of environmental permits is such a desirable reform, at least in the first instance. The finer details of how such a review system could be designed are not the subject of the current study, but may become a task for future projects. In our opinion, in such reform work, the door should also be kept open for the issue of whether appeals against environmental permits should take place through judicial or administrative means, i.e. a similar system structure found in Denmark, Norway and Iceland (cf. section 4).

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